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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO. 4560 OF 2021

ROYSTEN ANDREW FERNANDEZ

....PETITIONER

V/s.

**CHANDRASHEKHAR BAPUSAHEB
SHEDGE AND ORS**

.....RESPONDENTS

**Mr. Surel Shah i/b Shivprasad R. Page Advocate for the Petitioner
Mr. Prashant Darandale Advocate for Respondent**

CORAM : NITIN W. SAMBRE, J.

DATE: FEBRUARY 28, 2022.

P.C.:

1) Petitioner, Plaintiff in R.C.S. No. 1997/2013 which is for declaration, permanent injunction based on title, has took out Application Exh. 63 under Order VI Rule 17 of the Code of Civil Procedure, 1908 which is rejected vide impugned order dated 16/10/2018.

2) Mr. Surel Shah, learned counsel for the Petitioner would urge that there operates temporary injunction in favour of Petitioner,

restraining the Respondent-Defendant from interfering with the possession of the Petitioner over the Suit property. According to him, the Court Commissioner submitted his report on 03/07/2017 which reflects encroachment of the Respondent which has prompted Petitioner to take out Application Exh. 63, may be at little belated stage. He would claim that so as to avoid multiplicity of litigation and in the interest of justice, the Court below ought to have granted amendment.

3) Mr. Darandale, learned counsel appearing for the Respondent would strenuously urge that the fact about existence of encroachment was well within the knowledge of the Petitioner which he has tried to substantiate from the pleadings in the Plaint. Counsel then would rely on the Judgment of Apex Court in the matter of **M/s. Revajeetu Builders and Developers Vs. M/s. Narayanaswamy and Sons and Ors**¹ so as to claim that in absence of due diligence on the part of the Petitioner, the Court below has rightly inferred that amendment as prayed cannot be granted as the trial has commenced and the amendment will change the nature of the claim.

4) Report of Court Commissioner on 03/07/2017 which speaks of

¹ AIR 2009 SC (Supp) 2897

existence of encroachment can be inferred from the record. Even if the Trial has commenced i.e. Petitioner-Plaintiff is under cross-examination based on report of Court Commissioner, if the Petitioner has taken out an Application for amendment, it cannot be inferred that there was absence of due diligence on the part of the Petitioner. Rather refusal of the amendment will lead to injustice and further give rise to multiple litigation.

5) In the aforesaid background, in my opinion, order impugned passed below Exh. 63 is not sustainable. In that view of the matter, order impugned dated 16/10/2018 passed by 9th Jt. Civil Judge Senior Division, Pune is hereby quashed and set aside. Application Exh. 63 stands allowed subject to payment of cost of Rs. 10,000/- to be deposited in the Court below within period of two weeks from today before carrying out amendment. Deposit of cost shall be condition precedent. Respondent-Defendant shall be entitled to withdraw the same.

6) Once the amount is deposited, amendment to be carried out within one week thereafter. Needless to clarify that Respondent-Defendant shall be entitled to carry out consequential amendment

within two weeks from the service of such amendment on the Respondent.

7) Needless to clarify that further consequences qua filing of additional affidavit shall follow.

8) Petition stands allowed in the above terms.

[NITIN W. SAMBRE, J.]